In the Supreme Court of the United States

OCTOBER TERM, 1977

FRANK P. NORTH, JR., PETITIONER

v.

UNITED STATES OF AMERICA

JACK E. WALKER, PETITIONER

v.

UNITED STATES OF AMERICA

PETER V. PAPPAS, PETITIONER

v.

UNITED STATES OF AMERICA

ROBERT CRAIG, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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No. 77-1499

FRANK P. NORTH, JR., PETITIONER

v.

UNITED STATES OF AMERICA

No. 77-1500

JACK E. WALKER, PETITIONER

v.

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No. 77-1501

PETER V. PAPPAS, PETITIONER

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No. 77-1502

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 59-151) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on December 12, 1977. A petition for rehearing was denied on March 21, 1978, and the petitions for a writ of certiorari were filed on April 20, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether a state legislator is privileged to prevent introduction of evidence of his legislative acts in a federal criminal prosecution.

2. Whether the evidence regarding use of the mails and interstate travel was sufficient to prove violations of the mail fraud statute, 18 U.S.C. 1341, and the Travel Act, 18 U.S.C. 1952.

3. Whether specific intent to use the mails must be proven as to a defendant convicted of conspiracy to commit mail fraud.

4. Whether recordings of conversations of petitioners Craig, Walker, and Pappas were properly admitted into evidence in the circumstances of this case.

5. Whether exculpatory materials were improperly withheld from petitioner Walker (No. 77-1500).

6. Whether the rule of *Dunn* v. *United States*, 284 U.S. 390, permitting inconsistent verdicts, should be overruled (No. 77-1499).

7. Whether petitioner Craig is entitled to a new trial by reason of his tactical decision to rely on an earlier opinion of the court below on the legislative privilege issue (No. 77-1502).

8. Whether petitioners were prejudiced by joinder of a co-defendant's perjury indictment.

STATEMENT

After a jury trial in the United States District Court for the Northern District of Illinois, petitioners were convicted of conspiracy to commit mail fraud, in violation of 18 U.S.C. 371 and 1341. Petitioners Craig and Pappas were convicted on 11 substantive counts, and petitioners Walker and North were convicted on three substantive counts, all in violation of 18 U.S.C. 1341. In addition, petitioners Craig and Pappas were convicted on two counts of interstate travel to commit bribery, in violation of 18 U.S.C. 1952. Petitioners Craig, Walker, and North were sentenced to concurrent terms of three years' imprisonment and a fine of $5,000; petitioner Pappas was sentenced to five years' imprisonment and a fine of $10,000. The court of appeals affirmed in a lengthy opinion, with one judge dissenting (Pet. App. 59-151).[1]

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[1] "Pet. App." refers to the joint appendix filed by petitioners in Nos. 77-1499, 1500, 1501, 1502 and 1504.

The evidence is set forth in detail in the opinion of the court of appeals. Briefly, it showed that certain members of a trade association, the Northern Illinois Ready-Mix and Materials Association (NIRMMA), wanted to increase the weight limit on ready-mix cement that could lawfully be hauled by its members' trucks on Illinois state roads. At an October 1971 meeting of the NIRMMA board, it was determined that the time was ripe for the introduction of a weight-relief bill in the Illinois legislature. NIRMMA member James McBride knew petitioner Peter Pappas, a lobbyist with the Illinois Motor Vehicle Laws Commission, which had initial jurisdiction to draft and consider such a bill. McBride predicted that getting the bill enacted would cost a great deal of money; two other NIRMMA board members estimated that the cost of enacting the bill might reach $100,000 (Pet. App. 61-62). Shortly thereafter, McBride, unindicted co-conspirator Lauwereins, and several other NIRMMA members met with petitioner Pappas to discuss passage of the bill; Pappas advised them that his fee would be $5,000 and that more money would be required later (Pet. App. 61-62).

At some time in October or early November 1971, petitioner Pappas contacted Republican state representative Pete Pappas (no relation), a member of the Motor Vehicle Laws Committee (MVLC), and advised him that the industry representatives were willing to pay for passage of the weight relief bill (Pet. App. 62-63). Rep. Pappas then separately spoke

with co-defendant Donald Carpentier, a Republican state senator and also a member of the MVLC, and with petitioner Craig, a Democratic state representative; Rep. Pappas told them of the industry's willingness to pay for passage of the bill (Pet. App. 63). After a few days, Craig contacted Rep. Pappas and advised him that the fee for the Democratic side of the state House would be $10,000; Rep. Pappas and Carpentier followed this lead and determined that it would require $10,000 each for the Republican sides of the state House and Senate (*ibid.*). Craig said the money ought to be paid as the bill passed each house. Rep. Pappas proceeded to talk with Democratic state Senator Kenneth Course, and the latter agreed to participate (Pet. App. 64).[2] Petitioner Pappas was then advised of the sum involved and of the requirement that it be paid as soon as the legislation passed each house (Pet. App. 66).

On November 5, 1971, petitioner Pappas met with several NIRMMA members, advised them that the bill would be first introduced through the MVLC, and left the members with the understanding that any payment beyond his $5,000 fee would be required only if the bill passed both houses of the legislature and was signed by the governor (Pet. App. 64-65). On November 8, 1971, petitioner Pappas met with ID-MRCA[3] member Herbert Craig (no relation to peti-

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[2] Course was also convicted at trial, but he died while the appeal was pending.

[3] ID-MRCA was a down-state trade association (Illinois Division—Midwest Ready-Mix Concrete Association) that in-

tioner Craig) and several NIRMMA members to rehearse Craig's testimony before the MVLC, scheduled for the next day. Shortly after the MVLC meeting, the Commission secretary mailed notices of the date, time and place for the December 1971 meeting of the Commission. One of the persons on the mailing list was NIRMMA executive secretary Tom Connolly (Pet. App. 66).

At the December 1971 meeting of the MVLC, a subcommittee that included Course, Carpentier, and Rep. Pappas was created to consider the bill that had been drafted at the request of petitioner Pappas (Pet. App. 67). After this meeting, notices concerning the agenda of the January 1972 meeting of the Commission were mailed out.

The day of the January MVLC meeting, McBride met with fellow NIRMMA member Wille and told him that petitioner Pappas had said that the fee for passage of the ready-mix industry bill would be $50,000 in cash, to be paid only if the bill became law (Pet. App. 67). To collect the $50,000, NIRMMA members ultimately decided to assess each member $40 per truck in operation (Pet. App. 68). In addition, Lauwereins travelled from Chicago to Indianapolis on February 29, 1972, where he addressed members of the ID-MRCA in a hotel room. He attempted unsuccessfully to convince the ID-MRCA members to contribute to the $50,000 fund to obtain the weight relief legislation (Pet. App. 68-69).

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cluded businesses that would also benefit from the weight-relief legislation (Pet. App. 64).

During March 1972, NIRMMA members accumulated all but $3,160 of the $50,000 sought. False expense vouchers were sent by mail to NIRMMA to reimburse one company for the advance of the $3,160. The checks issued by NIRMMA were in turn cashed by the individuals who submitted the false vouchers, and the contributor was given the proceeds (Pet. App. 69-70). After petitioner Pappas counted the money, the $50,000 fund was deposited in a safe deposit box in Chicago (Pet. App. 68, 70).

Shortly before the industry bill was introduced in the state legislature in April 1972, petitioner Pappas informed Sen. Carpentier and Rep. Pappas that the fund was ready. Later that month, petitioner Pappas advised Rep. Pappas that the industry would pay when the governor signed the bill (Pet. App. 70-71). Rep. Pappas pointed out that the legislators' agreement had been otherwise. He contacted Craig, and the two spoke with petitioner Pappas. Craig offered a compromise: payment would be made after the bill passed both houses of the legislature, irrespective of what the governor might do. A few days later, petitioner Pappas informed Rep. Pappas that the industry would agree to the compromise (Pet. App. 71).

In early May 1972, Carpentier spoke with ten Republican senators—one of them, petitioner Jack E. Walker, agreed to support the bill in return for "help in his district" (Pet. App. 71). Carpentier told Course that eleven Republican votes could be delivered in the Senate and that Course would have to make up the rest (Pet. App. 72). In return for an extra $500,

petitioner Walker later took over sponsorship of the bill in the Senate (*ibid.*).

In June 1972, while the bill was pending in a Senate committee, defendant Herbert Craig of ID-MRCA received an urgent call from Lauwereins. The latter said that the bill was in danger and that petitioner Pappas needed $500 immediately. Lauwereins said he would prepare a false voucher to NIRMMA to reimburse Craig; the latter, along with Chalden, the executive secretary of ID-MRCA, prepared and cashed a $500 check, and Herbert Craig delivered the money to petitioner Pappas (Pet. App. 72).

The bill passed the Senate on June 21, 1972, and the industry requested its members, through bulletins mailed to them, to urge the governor to sign the bill. At the same time, the legislators were eager to receive their payments, but Rep. Pappas was rebuffed after speaking with McBride, Lauwereins, and petitioner Pappas (Pet. App. 73-74). After the governor vetoed the bill on August 8, 1972, Course began to make inquiries about his "campaign contribution" (Pet. App. 74).

The industry representatives decided not to pay the original $50,000 because their understanding of the agreement was that payment would only be required if the bill was signed into law. However, they decided to raise an additional $30,000 to be provided by two companies to compensate the legislators for their services (Pet. App. 74-75). In response to further requests for payment from Rep. Pappas, the $30,000 was raised in September 1972 and was turned over

to petitioner Pappas around the end of the month (Pet. App. 76).

Petitioner Pappas in turn delivered $5000 in cash in an envelope to Course; the latter divided the money among several Democratic state senators. On September 25, 1972, petitioner Pappas met by prearrangement with Rep. Pappas, Carpentier, and petioner Frank P. North; an envelope containing $10,000 in cash was given to Rep. Pappas (Pet. App. 77). The latter gave $1,000 to North and $5,000 to Carpentier (Pet. App. 78). A few days later Carpentier mailed $500 to petitioner Walker and $100 each to eight other state senators (Pet. App. 78-79).

After deciding against a veto override attempt on the advice of Course and Rep. Pappas, the industry representatives removed the $50,000 fund from the safety deposit box and redistributed it to the contributors (Pet. App. 79).

Carpentier was subpoenaed to appear on May 29, 1973, before the grand jury that eventually returned the indictment in this case. Petitioner Pappas advised him to deny everything, which he did (Pet. App. 79). Two months later, Craig, Rep. Pappas and petitioner Pappas met. Petitioner Pappas informed the others that he had been visited by two federal prosecutors about the cement bill legislation. Petitioner Pappas offered to concoct a story for the grand jury if Craig and Rep. Pappas would each give him $5,000. Petitioner Pappas also made a similar offer to Carpentier, but neither Carpentier nor Rep. Pappas gave him the money (Pet. App. 79-80).

ARGUMENT

1. Petitioners first contend that as state legislators they were entitled to the benefit of a federal common-law "legislative privilege," which, they claim, bars inquiry into their legislative activities and requires dismissal of an indictment involving such acts.[4] This claim is also raised in the companion case of *Markert* v. *United States*, No. 77-1504. However, despite dicta to the contrary in *In re Grand Jury Proceedings*, 563 F.2d 577 (C.A. 3), there is no common law privilege that immunizes the acts of state legislators or that bars the receipt of evidence bearing on such acts in a criminal prosecution in federal court. The same arguments in support of a legislative privilege claim were recently raised in *DiCarlo* v. *United States*, No. 77-990, and this Court denied certiorari on March 20, 1978. We rely on the analysis contained in our brief in opposition in *DiCarlo*, as well as the analysis in our brief in opposition in *Markert* v. *United States*, No. 76-179, certiorari denied, 429 U.S. 999. Copies

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[4] All petitioners have joined in this argument by adoption, either specifically (Pet. No. 77-1500, p. 19; Pet. No. 77-1501, p. 8; Pet. No. 77-1502, p. 16) or by general adoption of the other petitioners' arguments (Pet. No. 77-1499, p. 2).

We note that petitioner Pappas has no standing to raise this claim. Although admitting that he was not a legislator, he contends (*id.* at 8) that he drafted the bill in question as an "aide" to legislators. However, his soliciting of money from industry representatives and his other acts in furtherance of the scheme were not, by any conceivable interpretation, acts performed as a part of or incidental to the role of a legislator. See *United States* v. *Brewster*, 408 U.S. 501, 526.

of our briefs in opposition in those cases are being forwarded to counsel for petitioners herein.

2. Petitioners contend (Pet. No. 77-1500, pp. 11-12; Pet. No. 77-1501, pp. 9-12; Pet. No. 77-1502, pp. 17-18) that the instant prosecution represents federal overreaching under the mail fraud statute, 18 U.S.C. 1341, and the Travel Act, 18 U.S.C. 1952. They rely chiefly upon the dissenting opinion of Judge Swygert, who thought that the mailings were not sufficiently central to the bribery scheme and the interstate travel not so significant as to warrant federal intervention (Pet. App. 127-143). The majority below, in a thorough opinion, found that the mailings and interstate travel were sufficiently related to the scheme to justify application of the two statutes to petitioners. This essentially factual determination by the court of appeals does not merit further review. See *Berenyi* v. *Immigration Director*, 385 U.S. 630, 636. It is, moreover, amply supported by the record.

a. It is true, as petitioners note, that the mailings must be for the purpose of executing the scheme. *United States* v. *Maze*, 414 U.S. 395, 399-400; *Kann* v. *United States*, 323 U.S. 88, 94. However, it is not necessary that the scheme specifically contemplate the use of the mails; it is sufficient if the mailings were incident to an essential part of the scheme. *Pereira* v. *United States*, 347 U.S. 1, 8; *United States* v. *Buchanan*, 544 F. 2d 1322, 1325 (C.A. 5), certiorari denied, 432 U.S. 907; *United States* v. *Perkal*, 530 F.2d 604, 607 (C.A. 4), certiorari denied, 429 U.S. 821; *United States* v. *Street*, 529 F.2d 226, 228 (C.A. 6).

Petitioners' scheme here had the ultimate purpose of securing, through bribery, passage in the Illinois legislature of a weight relief bill for ready-mix industry cement trucks. The core of the plan was the collection of bribery funds from a host of member firms and the dissemination of such funds to an almost equally numerous group of corrupt legislators. The mailings made in furtherance of the plan fall into three groups: those between co-conspirators concerning the passage of the cement bill; those that facilitated the gathering of the bribe funds; and those that resulted in a distribution of the funds to state legislators.

The first group includes the mailings in counts 2-5 (notices of MVLC meetings and agenda) and 10-11 (bulletins to industry representatives to urge the governor to sign the bill) (Pet. App. 96-98, 101). The MVLC mailings "served to inform the recipients of the status of their sought-after proposal in the MVLC so that the steps necessary to secure its passage could be taken" (Pet. App. 99). These mailings thus furthered and promoted the scheme. The bulletins involved in counts 10 and 11 sought to achieve the ultimate purpose of the scheme, *i.e.*, the signing into law of the cement bill, and thus were also in furtherance of the scheme, as the court below held (Pet. App. 101-102).

The second group of mailings, those concerning the gathering of the bribe funds, involve counts 6 and 7 (dues abatement letters mailed to NIRMMA members) and counts 8 and 9 (fraudulent expense vouchers mailed to NIRMMA to reimburse one of the contributors to the bribe fund) (Pet. App. 96, 99-100). The fund was collected by assessing each NIRMMA member $40 per each truck which he operated. As petitioner Craig conceded below (Pet. App. 99-100), the purpose of spreading the assessment among all the members and remitting dues through the letters in question was to "soften the blow"—and therefore to make more likely the prospect of collecting all of the money needed for the bribery fund. Hence, the broad-based collection was an essential element of the scheme which simply could not have been effective without the low cost and relative speed provided by using the mails. The court below therefore properly concluded that the mailings involved in these counts were both foreseeable and essential to consummate the scheme (Pet. App. 100).

The final mailing, that of $500 to petitioner Walker from Sen. Carpentier (count 12), was a distribution of a portion of the bribery fund in consummation of the bribery scheme. As such, it was clearly incident to an essential element of the scheme, *i.e.*, the bribery of state legislators, and was reasonably foreseeable. *United States* v. *Maze*, *supra*, 414 U.S. at 400-401; *Pereira* v. *United States*, *supra*; *United States* v. *Barrett*, 505 F.2d 1091, 1104 n. 11 (C.A. 7).[5]

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[5] We would also point out that, because concurrent sentences were imposed in this case, it is unnecessary to review the adequacy of the evidence under each separate count of the indictment. *See, e.g., Barnes* v. *United States*, 412 U.S. 837, 848 n. 16.

b. There is no merit in the argument of petitioners Craig (Pet. No. 77-1502, pp. 17-18) and Pappas (Pet. No. 77-1501, pp. 10-12) that the degree of interstate travel underlying their convictions on counts 13 and 14 was insufficient to warrant conviction under the Travel Act, 18 U.S.C. 1952.

The gravamen of these counts was co-conspirator Lauwereins' travel to Indianapolis, Indiana, in February 1972 to attempt to enlist ID-MRCA's aid in contributing to the bribe fund. Given the magnitude of the benefit petitioners and those paying the bribes hoped to achieve by procuring passage of the bill and the concomitant need to raise funds from all of those who stood to gain by it, the court below correctly held that travel for this purpose was more than "minimal" or "incidental" and thus sufficient to warrant application of the Travel Act (Pet. App. 111-112). Indeed, the trip was viewed by the conspirators as an "important" episode in the fund raising campaign. *Ibid.* This distinguishes the present case from *United States* v. *Isaacs*, 493 F.2d 1124, 1146 (C.A. 7), certiorari denied, 417 U.S. 976, on which petitioners rely, since in *Isaacs* a check drawn on an Illinois bank account to distribute bribery proceeds fortuitously happened to clear through an out-of-state bank. Here, the interstate travel was both planned and undertaken to achieve an essential step in the fraudulent scheme.[6]

[6] Again, it is not necessary to reach the validity of the convictions on these counts because of the concurrent sentences that were imposed. *Barnes* v. *United States*, 412 U.S. 837, 848, n. 16.

3. Petitioner Walker also contends (Pet. No. 77-1500, pp. 12-14) that specific agreement and intent to use the mails is an essential element of the offense of conspiracy to commit mail fraud.[7] The court of appeals, in a thorough analysis upon which we rely (Pet. App. 103-106), held that since the substantive offense does not require an intent to use the mails, conspiracy to commit the offense could not require a greater mental state than the underlying substantive offense. The court noted that petitioners were arguing in effect that they had to have knowledge of the federal jurisdictional basis of their offense, an argument laid to rest by *United States* v. *Feola*, 420 U.S. 671, 694. Since guilt of the substantive offense of mail fraud does not require an intent to use the mails, but may be established by proof that the scheme to defraud caused a use of the mails (*Pereira* v. *United States*, *supra*, 347 U.S. at 8-9), the decision below is correct in this regard and does not merit further review.

4. Petitioners Craig, Pappas, and Walker raise several arguments with respect to certain recordings of their conversations introduced into evidence at

[7] The district court's charge emphasized that the government must prove beyond a reasonable doubt "that the defendant, with knowledge of the purpose of the conspiracy, and reasonably foreseeing a use of the mails in furtherance thereof, willfully became a member of the conspiracy * * *" (Pet. App. 103). This charge was based firmly on *Periera* v. *United States*, *supra*, 347 U.S. at 8-9.

trial.[8] Craig and Pappas were overheard in face-to-face conversations with Rep. Pappas, and Walker was recorded in telephone calls with Carpentier (Pet. App. 81, 85-87, 89). Their claims are meritless and do not warrant further review.

a. Pappas and Craig first contend (Pet. No. 77-1501, pp. 27-33; Pet. No. 77-1502, pp. 18-20) that Rep. Pappas did not consent to the recording of his conversations, so that the "color of law" exception of 18 U.S.C. 2511(2)(c) for consensual interceptions was improperly invoked.[9] The court of appeals held, in an opinion on which we rely (Pet. App. 85-89), that Rep. Pappas agreed to cooperate with the government prior to recording any conversations with petitioners. The court below correctly noted that although a formal plea agreement was not signed until after two of the conversations had been recorded, Rep. Pappas was clearly cooperating with the government at the time of the recordings, and that "every aspect of the recording of the conversations * * * was supervised by the government" (Pet. App. 86-87). Indeed, a gov-

[8] Petitioner North was not overheard in any conversations, and no such recording was directed against him (Pet. App. 94). He therefore is not an "aggrieved person" within the meaning of Title III and lacks standing to challenge the validity of the recordings. See 18 U.S.C. 2518(10)(a) and 2510(11); see also *Alderman* v. *United States*, 394 U.S. 165, 171-173.

[9] Petitioner Walker concedes that Carpentier consented to the recording of his conversations; he does not here pursue the claim raised below that Carpentier's consent was legally invalid. See Pet. App. 82, n. 13.

ernment agent set up the recording equipment for Rep. Pappas, operated the equipment, and took custody of the equipment and the tapes thereafter (*ibid.*). See *United States* v. *Hall*, 536 F.2d 313, 317, 327 (C.A. 10), certiorari denied, 429 U.S. 919; *United States* v. *Ransom*, 515 F.2d 885, 890 (C.A. 5), certiorari denied, 424 U.S. 944; *United States* v. *Armocida*, 515 F.2d 49, 52 (C.A. 3), certiorari denied, 423 U.S. 858.[10] This factual resolution by the courts below does not require further review. *Berenyi* v. *Immigration Director*, *supra*.

b. Petitioners Craig and Pappas also contend (Pet. No. 77-1502, pp. 19-20; Pet. No. 77-1501, p. 4) that 18 U.S.C. 2511(2)(c), which removes criminal penalties for those who intercept conversations under "color of law," does not authorize the use at trial of the fruits of such an interception. Petitioners' argument appears to be that Section 2511(1)(b), which prohibits the use of a recording device to intercept an

[10] *United States* v. *Bynum*, 360 F. Supp. 400, 408-409 (S.D. N.Y.), affirmed, 485 F.2d 490 (C.A. 2), vacated on other grounds, 417 U.S. 903, appeal after remand, 513 F.2d 533, certiorari denied, 423 U.S. 952; and *Smith* v. *Wunker*, 356 F. Supp. 44, 46 (S.D. Ohio), are not to the contrary. Rather, they hold that the mere recording of a conversation by a party to it, for later revelation to the government, is not even an "interception" within the meaning of Title III. Since the recording by Rep. Pappas here also was for later revelation to the government, it is difficult to understand how the storing of his recordings could invalidate the procedure. See also 18 U.S.C. 2511(2)(d), authorizing a person, not acting under color of law, to intercept communications to which he is a party where he has no purpose to commit a criminal or tortious act.

oral conversation, also bars evidentiary use of the recording of a lawfully intercepted conversation. The plain language of Section 2511(1)(b) shows, however, that it is concerned with the unauthorized invasion of privacy rights; it has nothing to do with evidentiary use of legitimately intercepted conversations. Use at trial of the fruits of an interception is instead governed by 18 U.S.C. 2517(3), which requires a threshold determination that the interception was authorized under Title III. See *United States* v. *Armocida, supra*, 515 F.2d at 52 ("18 U.S.C. §§ 2511 (2)(c) and 2517(3), taken together, specifically authorize the admission into evidence of warrantless recordings [where one of the parties has consented]"); see also *United States* v. *Harvey*, 540 F.2d 1345, 1352-1353 (C.A. 8); *United States* v. *Marion*, 535 F.2d 697, 707 (C.A. 2); *United States* v. *Clegg*, 509 F.2d 605, 612-613 (C.A. 5).

c. Next, petitioners contend (Pet. No. 77-1501, pp. 15-23) that the recordings should not have been admitted because of purported failures to demonstrate the chain of custody of the tapes and to seal them promptly. The court of appeals held that notwithstanding a lack of proof at trial of strict chain of custody, the purpose of the rule—to show that the item is in the same condition as it was when received by the proponent—was satisfied by reliable proof. Representative Pappas, who participated in the conversations, testified that the tapes accurately reflected such conversations, and an expert witness, Prof. Weiss, testified that in his opinion the tapes had not

been altered (Pet. App. 90-91). Under these circumstances, the court below properly held that the district court had not abused its discretion in accepting the government's foundation for the admission of the evidence. *United States* v. *Nace*, 561 F.2d 763, 771 (C.A. 9); *United States* v. *Biggins*, 551 F.2d 64, 66-67 (C.A. 5); *United States* v. *Cosby*, 500 F.2d 405, 406 (C.A. 9); *United States* v. *Avila*, 443 F.2d 792, 795-796 (C.A. 5), certiorari denied, 404 U.S. 944; Rule 901, Fed. R. Evid.

Nor was there any error in the failure to present the tapes to the district court for sealing. We rely on the reasoning of the court below that Congress exempted consensual interceptions from the requirements of Title III, including the sealing requirement of 18 U.S.C. 2518(8)(a) (Pet. App. 93).

d. Petitioners also contend (Pet. No. 77-1501, pp. 23-27) that their Fourth Amendment rights were violated by the consensual recordings here. As the court below concluded (Pet. App. 81-82), petitioners have no legitimate Fourth Amendment interest here, "for that Amendment affords no protection to 'a wrongdoer's misplaced belief that a person to whom he voluntarily confides his wrongdoing will not reveal it'" (Pet. App. 82, quoting from *Hoffa* v. *United States*, 385 U.S. 293, 302). See also *United States* v. *White*, 401 U.S. 745, 749; *United States* v. *Jones*, 545 F.2d 1112, 1114 (C.A. 8), certiorari denied, 429 U.S. 1075; *United States* v. *Hodge*, 539 F.2d 898, 905 (C.A. 6), certiorari denied, 429 U.S. 1091; *United States* v.

Bastone, 526 F.2d 971, 978 (C.A. 7), certiorari denied, 425 U.S. 973.

e. Next, petitioners Walker (Pet. No. 77-1500, pp. 17-18) and Pappas (Pet. No. 77-1501, pp. 43-45) contend that the rule of *Massiah* v. *United States*, 377 U.S. 201, excluding evidence of post-indictment interrogations of a defendant in the absence of counsel, should be extended to pre-indictment and pre-arrest situations. They argue that at the time their conversations were recorded, the government already had enough evidence to return an indictment against them, so the delay was purely for the convenience of the government in order that more evidence could be elicited. The right to counsel, however, which is the basis of *Massiah*, does not attach until the institution of formal criminal proceedings. *Kirby* v. *Illinois*, 406 U.S. 682. Moreover, as the court below properly held (Pet. App. 84), there was no evidence suggesting any delay in this investigation of a complex, multi-party scheme and there is no requirement that the government cease an investigation once probable cause is obtained. See *Hoffa* v. *United States*, *supra*, 385 U.S. at 309-310.

f. Petitioner Pappas also argues (Pet. No. 77-1501, pp. 36-39) that the recordings here were not obtained in compliance with guidelines promulgated by the Attorney General. He raised this claim prior to trial, but he then abandoned it, as he now concedes (*id.* at 38). It was not until the court below had affirmed his conviction that he moved for further discovery and hearings in the district court. He had his opportunity to delve into the matter prior to trial, yet he chose not

not pursue it further. As the government documented in its February 21, 1978, memorandum opposing further hearings on this subject, petitioner had ample information before him to pursue his claim of guideline infraction, but elected not to do so and thus waived the claim under Rule 12(f), Fed. R. Crim. P. The resolution of this factual question under Rule 12(f) warrants no further review.[11]

5. Petitioner Walker contends (Pet. No. 77-1500, pp. 14-17) that exculpatory materials, in the form of interviews with nine state senators whose information contradicted Senator Carpentier's testimony, was improperly withheld from him. The record shows that prior to trial Walker knew the identities of each of these senators and had in fact spoken with all but one or two of them; all had denied receiving money from Carpentier (Pet. App. 117). Moreover, Walker was offered the opportunity by the district court to subpoena the senators and have a hearing outside the presence of the jury to elicit the information he was seeking, but he declined that offer (*ibid.*). Accordingly, since the witnesses were already known by Walker, and since he also knew the substance of their testimony, he was not prejudiced and no suppression of favorable testimony occurred. See, *e.g.*, *United States* v. *Agurs*, 427 U.S. 97, 103; *Stubbs* v. *Smith*, 533 F.2d 64, 67 n. 5 (C.A. 2); *United States* v.

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[11] There is, accordingly, no occasion to hold this case pending disposition of *United States* v. *Caceres*, No. 76-1309, certiorari granted, June 5, 1978, where a similar argument is raised.

Akin, 464 F.2d 7, 8 (C.A. 8), certiorari denied, 409 U.S. 981.

6. Petitioner North (Pet. No. 77-1499, pp. 5-12) urges this Court to reconsider its holding in *Dunn* v. *United States*, 284 U.S. 390, that inconsistent verdicts are permissible.[12] Despite his recognition that *Dunn* has been followed "by numerous federal judges in the past 46 years" (*id.* at 5-6), he argues that this Court's subsequent decisions in *Sealfon* v. *United States*, 332 U.S. 575, which applied the principle of *res judicata* to separate prosecutions, and *Ashe* v. *Swenson*, 397 U.S. 436, which applied the principle of collateral estoppel to subsequent trials, have undercut the rationale for the decision in *Dunn*. That contention is without merit, for this Court has recently reaffirmed the rule of *Dunn* in *Hamling* v. *United States*, 418 U.S. 87, 101, and the concepts of *res judicata* and collateral estoppel have no application to the issue of inconsistent verdicts. See *United States* v. *Serlin*, 538 F.2d 737, 746-747 (C.A. 7); *United States* v. *Carbone*, 378 F.2d 420, 422-423 (C.A. 2), certiorari denied, 389 U.S. 914; *United States* v. *Greene*, 497 F.2d 1068, 1086 (C.A. 7), certiorari denied, 420 U.S. 909; *United States* v. *Zane*, 495 F.2d 683, 690 (C.A. 2), certiorari denied, 419 U.S. 895.

7. Nor is there any merit to petitioner Craig's claim (Pet. No. 77-1502, pp. 21-22) that he was prejudiced by reliance upon the first decision by the court

[12] North was convicted on three substantive mail fraud counts and acquitted on eight others. In addition, he was convicted of conspiracy to commit mail fraud.

below in his companion case (528 F.2d 773), holding that an evidentiary privilege was available to state legislators but could be waived. The instant trial was completed prior to the time that the court of appeals held, on rehearing *en banc*, that there was no federal common-law legislative privilege (537 F.2d 957). Craig argues that, had he anticipated this holding, he would have offered a different defense at trial. Since references in the indictment to legislative acts were deleted prior to trial, and since Craig was well aware that he could be prosecuted for fraud and corruption without an explicit showing of legislative acts (*United States* v. *Brewster*, 408 U.S. 508), it is difficult to understand how he could have been misled. He certainly has demonstrated no prejudice and merely speculates that he might have conducted his defense differently. As the court below recognized, however, the decision whether to testify in his own behalf was a strategy decision on Craig's part (Pet. App. 115); he sought to gain a tactical advantage and should not now be heard to complain because his strategy failed. See, *e.g.*, *United States* v. *Marcello*, 423 F.2d 993, 1004-1005 (C.A. 5), certiorari denied, 398 U.S. 959; *Bayless* v. *United States*, 381 F.2d 67, 75 (C.A. 9).

8. Finally, petitioner Pappas urges (Pet. No. 77-1501, pp. 39-42) this Court to exercise its supervisory powers and reverse his conviction because co-defendant Course's perjury indictment was consolidated for trial with petitioners' indictment for the cement bill

scheme.[13] Pappas argues that introduction of evidence on the perjury count against Course tainted the prosecution against the other defendants (Pet. No. 77-1501, pp. 41-42).[14] The perjury occurred during Course's testimony before the grand jury investigating the fraudulent scheme involved in this litigation; the commonality of the two offenses made joinder permissible as to Course. See *United States* v. *Pacente*, 503 F.2d 543, 545-546 (C.A. 7) (*en banc*), certiorari denied, 419 U.S. 1048; *United States* v. *Carson*, 464 F.2d 424, 436 (C.A. 2), certiorari denied, 409 U.S. 949; *United States* v. *Sweig*, 441 F.2d 114, 118-119 (C.A. 2), certiorari denied, 403 U.S. 932. Even if the joinder were improper as to Course, it is difficult to understand how the co-defendants could have been prejudiced, particularly when the trial court instructed the jury that the evidence as to Course's alleged perjury did not have any applicability to the other defendants (Tr. 2135-2136).

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[13] Walker and North apparently join in this contention. See Pet. No. 77-1499, p. 2; Pet. No. 77-1500, p. 19. Petitioners did not raise this issue in the court of appeals, although it was raised in pre-trial motions.

[14] Course was convicted on the perjury count as well as the mail fraud and travel act counts, but he died while the appeal was pending below.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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